MALAYAN BANKING BHD.

v.

YONG CHAO FOO

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[SUIT NO. S7-24-2660-89]
10 DECEMBER 1991

LAND LAW: *Caveat - Bank applies to remove private caveat - Defendant became registered owner pursuant to vesting order - Whether owner can file caveat over his own land - Foreclosure proceedings. Land charged to plaintiffs by borrower - Vesting order obtained by defendant 10 years after charges were registered in favour of plaintiffs - Whether vesting order subject to charges.*

CIVIL PROCEDURE: *Pleading - Allegation of fraud committed by borrower specifically pleaded - Bare allegation - Particulars, matters and circumstances of fraud not stated - Whether plaintiffs had knowledge that borrower was merely a trustee - Particulars of fraud not raised in defendant's pleadings - Affidavit in reply of defendant merely state plaintiff knew borrower was a trustee for defendant - Whether sufficient to raise allegation of fraud - Indefeasability of title.*

The plaintiff applied to remove a private caveat and sell a piece of land belonging to the defendant by auction. The said land when charged to the plaintiff was registered under the name of Lim Guan Cheng (the borrower) the sole proprietor of Lim Guan Cheng Construction. Pursuant to an order dated 1 September 1986, the said land was ordered to be vested under the name of the defendant. An official search made on 30 August 1989 showed that the said land had been registered under the name of the defendant as proprietor and that the defendant lodged a private caveat on the same. As at 12 September 1989 a sum of RM231,063 together with interest were due to the plaintiff by the borrower.

The defendant contended that the plaintiff had acted fraudulently when it knew that the borrower was merely a trustee for the defendant when it accepted the charges and the charge were contrary to the Companies Act 1965 and memorandum of articles of the defendant company and therefore *ultra vires*. Further the persons who executed the charges in favour of the plaintiff were not holding a valid power of attorney.

Held:

[1] The defendant merely asserted that the plaintiff knew that the chargor was merely a trustee for the defendant when it accepted the charges. On principles and authorities the defendants allegation of fraud is merely a bare general assertion and the defendant has not given any particulars, matters and circumstances to show when and in what way was the plaintiff involved in the purported fraudulent practice. Although the defendant accused the plaintiff with fraudulent intention or practice he failed to give details of the facts, matters and circumstances relating to the plaintiff's fraudulent practice. The defendant's allegation of fraud must in law be totally disregarded.

[2] The order of the Court vesting the said land in the defendant does not tantamount to a transfer of the said land by the borrower to the defendant and hence ss. 215(3) and 216 of the National Land Code 1965 cannot apply. The said charges by virtue of s. 340(1) read with subsection (3) of the National Land Code 1965 and the vesting order in favour of the defendant was subject to the three charges.

[3] As the exception in s. 340(2) of the National Land Code does not apply as they did not in the instant case, the registered charges must defeat a prior equitable right or interest (if any) of the defendant. Furthermore the plaintiff stands on firmer ground when the defendant had not at all material times lodged a caveat against the said land. In any event the maxim of he who is earlier in time is stronger in law must apply in favour of the plaintiff.

[Plaintiffs application allowed with costs with order in terms.]

Cases referred to:

Eu Finance Bhd. v. Siland Sdn. Bhd. (M&J Frozen Food Sdn. Bhd., Intervener) [1989] 1 MLJ 196 ***(cit)***

Wellington v. The Directors of the Mutual Society and the Official Liquidator [1879 - 1980] AC 685 ***(foll)***

Bank Bumiputra Malaysia Bhd. v. Mahmud Bin Haji Mohamed Din (Datin Hajjah Salma Bte Md. Jamin, Intervener) [1989] 1 MLJ 381 ***(foll)***

Macau Express Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 53 ***(foll)***

Abigail v. Lapin [1934] Ac 491 ***(foll)***

Legislation referred to:

National Land Code 1965, ss. 215, 216, 244, 247, 248(2),254, 256, 257, 323(1)(a), 340(2)(a)

Rules of the High Court 1980, O. 18 rr. 8, 12

For the plaintiff - W.M. Chang; M/s. Mah & Din

For the defendant - M. Murthi; M/s. M.S. Murthi & Partners

JUDGMENT

Lim Beng Choon J:

This is an application made by way of originating summons by the plaintiff primarily for the following orders:

(1) That the private caveat registered under caveat presentation No. 6366/84 Jilid 37 Folio 173 be removed forthwith.

(2) That the land belonging to the defendant held under H.S. (D) No. 43027 P.T. No. 1037 Mukim Batu (the said land) and charged to the plaintiff under the 3 charges registered as;

(a) Presentation No. 3739/75 Jilid 24 Folio 97

(b) Presentation No. 10458/75 Jilid 35 Folio 130

(c) Presentation No. 11096/79 Jilid 21 Folio 78

be sold by public auction under ss. 256 and 257 of the National Land Code 1965 to satisfy the total sum due to the plaintiff at the date of the order and interest on the said total sum due thereafter at the rate stipulated by the plaintiff and from time to time until the date of full payment.

The plaintiff also prayed for the usual orders regarding the Court fixing the date of the auction, the Senior Assistant Registrar to fix the reserve price, and to give the necessary orders or direction for the auction, and the appropriate authorities to register the name of the new purchaser or purchasers as proprietor (s) of the said land free from encumbrances, etc.

In the affidavit in support of the plaintiff's aforesaid application, its branch manager Phong Ken Pin (Phong) affirmed an affidavit on 28 December 1989 (encl. 2) in which it was asserted *inter alia* that the said land was formerly registered under the name of Lim Guan Cheng (the

borrower) as proprietor and the borrower was at all material times trading under the name and style of Lim Guan Cheng Construction (the borrower's firm). Phong went on to say that at the request of the borrower the plaintiff granted an overdraft facility to the borrower's firm under the current account No. 79/17 up to a limit of RM35,000. In order to secure the overdraft facility the borrower charged the said land to the plaintiff which charge was registered under charge presentation (a) as mentioned earlier. Subsequently at the borrower's request, the limit of the overdraft facility was increased by another RM35,000 and then still another RM20,000 making a grand total of RM90,000 as the limit of the said facility. In order to secure the said increases in the limit of the overdraft facility the borrower further charged the said land to the plaintiff by way of charges registered under charge presentations (b) and (c) as mentioned earlier. It was then stated by Phong that by an order of Court dated 1 September 1986, the said land was *inter alia* ordered to be vested under the name of the defendant. A true copy of the order ("the vesting order") of the Court was produced and marked as Exh. 'PKP4' annexed to the affidavit. It is to be noted that the said order was made pursuant to a Kuala Lumpur High Court Civil Suit No. F22-300-86 instituted by the defendant in the present case as plaintiff in that civil suit against the Official Assignee of the Estate of Lim Guan Cheng. The operative part of the said order reads as follows:

> **It Is Ordered:**
>
> 1. That an injunction be and is hereby granted to restrain the defendant from selling, assigning, transferring or in any other way dealing with the trust land without leave of the Honourable Court; and
>
> **It Is Further Ordered**
>
> That upon the Registration of the order the title under the National Land Code to the said land held under H.S. (D) 43027 Lot No. P.T. 1037 Mukim of Batu Daerah Gombak, Negeri Selangor shall forthwith vest in the sole beneficiary of the trust Yong Chao Foo @ Yong Jeng (NRIC No. 3589999) as the absolute and beneficial owner thereof.

Phong then proceeded to state that an official search on the said land dated 30 August 1989 showed that the said land had been registered under the name of the defendant as proprietor and that the defendant lodged a private caveat on the same. Phong then went on to say that as at 12 September 1989 the - amount owing under the overdraft facility was in the sum of RM231,063 and interest thereon was charged at the rate of 8.5% per annum on monthly rests from 13 September to the date of full settlement. A letter dated 13 October 1989 was sent by the plaintiff through its solicitors to the defendant demanding payment of the outstanding sum and as there was no response from the defendant the plaintiff again through its solicitors served the defendant with the statutory notice Form 16D on 13 November 1989. The defendant still failed to comply with the said notice - hence the institution of this action by the plaintiff.

In his affidavit-in-reply affirmed on 16 February 1990 (encl. 7) the defendant averred *inter alia* that the amount purportedly claimed was not due and payable in that the plaintiff knew that the chargor was merely a trustee for the defendant when it accepted the charges. In any event the charge was contrary to the Companies Act 1965 and memorandum of articles of the defendant company and therefore *ultra vires.* In the premises the charge was null and void and inoperative. Further the persons who executed the charges for the plaintiff were not holding a valid Power of Attorney.

In response to the said affidavit-in-reply of the defendant, the plaintiff through Phong affirmed a second affidavit on 3 August 1390 in which he asserted *inter alia* that at all material times inclusive of the date in which the plaintiff accepted the charges of the said land the plaintiff

was totally unaware that Lim Guan Cheng, the borrower, was only a trustee of the defendant. At the time of the acceptance of the charges the interest of the defendant, if any, in the said land was never registered, neither did he lodge a caveat to protect his interest (if any). In the circumstances the plaintiff in accepting the charges was acting in good faith. As regards to the persons who executed the charges on behalf of the plaintiff, Phong said that they were the attorneys of the plaintiff having been granted power of attorney which was duly registered with the relevant Collector of Land Revenue. The total amount due and payable to the plaintiff pursuant to the overdraft facility under the account No. 79/17 secured by the charges was an account opened in the name of Lim Guan Cheng Construction of which the borrower was the sole proprietor. Furthermore the plaintiff had instituted an action against Lim Guan Cheng in respect of the amount due and payable under the overdraft facility in Kuala Lumpur High Court Civil Suit No. C2473 of 1982 and had obtained judgment dated 30 August l983. The judgment so obtained was a judgment in default and the borrower, the defendant there, was directed to pay the plaintiff the sum of RM126,743.37 with interest thereon at the rate of 8.5% per annum as from 1 December 1982 to date of full payment with RM225 costs.

Counsel for the plaintiff submits *inter alia* that the procedure and substantive law in relation to obtaining an order for sale pursuant to a registered charge is contained in chapter 3 of Part 16 of the National Land Code 1965 which covers ss. 253 to 269. For purpose of that Chapter, the word chargor has been defined by s. 248 which reads:

(1) The provisions of ss. 244 to 247 and Chapters 3 to 5 shall apply both to charges created under this Act and to those under the provisions of any previous land law.

(2) References in any of the said provisions to the chargor or the chargee shall be construed in relation to any charge as references to the person or body in whom the charged land or lease is for the time being vested or, as the case may be, the person or body for the time being entitled to the benefit of the charge.

This, so says Counsel, suggests that once the defendant in the present case is vested as proprietor of the said land, he steps into the shoes of the original owner/chargor for the purpose of an application for an order for sale by the plaintiff/chargee. In support of his proposition Counsel then cites s. 254 where it is stipulated that procedurewise, the Form 16D must be served on the defendant who is defined as the chargor for purpose of the said section. Since the procedure had been complied with, the order for sale should be given unless the defendant can show cause to the contrary under s. 256. Turning to the caveat Counsel says that the defendant as registered proprietor cannot lodge the said caveat by virtue of s. 323(1)(a) of the National Land Code 1965 as he cannot be claiming title to the said land since title is already his. Counsel relies on the authority of *Eu Finance Bhd. v Siland Sdn. Bhd.* (*M&J Frozen Food Sdn. Bhd., Intervener*) [1989] 1 MLJ 195 to support his argument. In any event, the caveat registered in 1984 has already lapsed by virtue of s. 328 being more than 6 years old.

Counsel for the defendant on the other hand submits *inter alia* that the core of the defendant's case is that the borrower had acted fraudulently in creating the charges over the said land. The defendant also contends that the plaintiff knew that the chargor was merely a trustee for the defendant when it accepted the charges. As the plaintiff has denied that it has knowledge that "Lim Guan Cheng (the borrower) was merely a trustee for the defendant", there is therefore a dispute of fact which must first be resolved before the law can be applied to the facts as finally determined by the Court. In the premises the summary application for an order for sale is inappropriate and the proceeding has to be converted into a witness-

action to resolve the conflict. As regards to the plaintiff's reliance on s. 248(2) of the National Land Code 1965 to show that chargor means the person on whom the said land is for the time being vested, Counsel contends that the plaintiff has not considered the effect of ss. 215 and 216 which govern transfer of title to land. Section 215(3) provides that the transferee of any alienated land shall hold subject to any encumbrances on the land such as charge etc. Likewise s. 216 provides that where any land is transferred subject to any charge the following consequence, among other things, must follow every provision, express or implied of the lease, charge or tenancy shall so long as the land continues to be vested in the transferee, be enforceable by or against him as if he were a party thereto. Counsel then goes on to argue that in the present case the said land was not "transferred" from the original chargor to the defendant - the Court by an order vested the said land in the absolute ownership of the defendant. The vesting of the said land was not subject to any of the charges on it and hence by applying s. 216 of the said Code the defendant is not subject to the charges or liable thereon.

In response to the submission of Counsel for the defendant, Counsel for the plaintiff further submits that it is trite law that the plaintiff's charges are indefeasible in accordance with s. 340 of the National Land Code 1965. It is clear according to Counsel that the defendant is relying on the exception provided for in s. 340(2)(a) of the said Code to defeat the plaintiff's charges when he alleges that the plaintiff's charges were procured by fraud to which the plaintiff was a party. However, so says Counsel, since the defendant has failed to raise the issue of fraud in his pleading the Court cannot adjudicate on the same. On the facts of this case, the defendant purports to raise the allegation of fraud based **solely** on part of para. 5 of the defendant's affidavit in Court encl. 7 which merely states: "the plaintiff knew that the chargor was merely a trustee for me when it accepted the charge". Such an averment is vague, general and does not give any and is insufficient by a long shot to raise the allegation of fraud. Furthermore there is bad faith on the defendant's part as evidenced by the defendant's affidavit encl. 7 which raises issues which are clearly frivolous and vexatious. Examples of this are as follows:

(a) paragraph 9 of the defendant's affidavit alleges that the charge is contrary to the Companies Act and the memorandum of articles of the company when the borrower is not even a company;

(b) paragraph 10 of the defendant's affidavit alleges that the charges have not been duly stamped. Again this allegation is not true as evidenced by Exh. 'PKP1' (which is the Registrar of Titles certification on the stamping) in Court encl. 8.

(c) paragraph 11 of the defendant's affidavit alleges that the persons who executed the charges did not have a valid power of attorney to do so. This is not true as evidenced by Exhs.s 'PKP2' and 'PKP3' annexed to the affidavit of Phong in Court encl. 8 which are copies of the power of attorney issued by the plaintiff to its officers who executed the charge instruments.

As regards to the contention of the Counsel for the defendant that the defendant's ownership of the said land is not subject to the plaintiff's charges, Counsel for the plaintiff retorted by saying that what the defendant is challenging is not the ownership of the defendant in respect of the said land but that the defendant took the said land subject to the plaintiff's charges which remain on the said land and are indefeasible. Counsel draws the attention of this Court to s. 340(1) which states that the interest of any person in whose name any charge is for the time being registered shall be indefeasible. Since the plaintiff's charges are still for the time being registered they are according to s. 340(1) indefeasible. The Court that made

the vesting order could have changed the position by invoking s. 417 but it clearly did not do so. Therefore by virtue of s. 340(1) the plaintiff's charges remain registered, enforceable and the plaintiff's right to foreclose on the said land exists in fact and enforceable as against the whole world. Moreover by way of a further and alternative argument, Counsel goes on to assert that the plaintiff's first charge was registered more than 10 years before the defendant filed the action wherein he sought the vesting order (the first action). By virtue of this and the fact that the defendant now contends that the order sought in the first action has defeated the plaintiff's charges, he must make the plaintiff a party to the first action or at least inform and notify the plaintiff of the same instead of obtaining a vesting order behind the plaintiff's back. This the defendant failed to do and is now using his own default as a defence and is saying that the plaintiff must now apply to make himself a party to the first action and apply for relief therein when the first action was filed and the vesting order obtained by the defendant behind the plaintiff's back in the first place.

I shall first deal with the allegation of 'fraud' as this allegation can be easily disposed of. It is to be noted that under O. 18 r. 8(1) of the Rules of the High Court 1980 (the RHC) it is specifically provided that:

> (1) A party must in any pleading subsequent to a statement of claim plead **specifically** any matter for example, performance, release, any relevant statute of limitation, **fraud** or any fact showing illegality ... (Emphasis added)

Again under O. 18 r. 12(1)(a) of the RHC it is specifically provided that:

> (1) Subject to para. (2) every pleading must contain the necessary **particulars** of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words:
>
> (a) **particulars** of any misrepresentation, **fraud**, breach of trust, wilful default or undue influence on which the party pleading relies, ... (Emphasis added)

It is to be noted that para. 2 of O. 18 r. 12 to which para. 1 of O. 18 r. 12 is stipulated to be subjected to is not applicable to the present case and hence it is irrelevant.

The scope of the said r. 18(1) and r. 12(1)(a) regarding the allegation of fraud is explained in the *English Supreme Court Practice* 1979 Edn., Vol. 1 at p. 290 where it is stated that:

> ...The necessary particulars of fraudulent intention must be contained in the pleading. The pleader should accordingly set out the **facts, matters and circumstances** relied upon to show the party charged had or was actuated by a fraudulent intention. Fraudulent conduct must be **distinctly** alleged and as **distinctly** proved, and it is not allowable to leave fraud to be inferred from the facts. ...The acts alleged to be fraudulent must be set out and then it must be stated that these acts were done fraudulently, otherwise no evidence in support of them will be received.
>
> (Emphasis supplied)

This proposition is supported by the case of *Wellington v. The Directors of the Mutual Society and the Official Liquidator* [1879-80] AC 685 (Counsel for the plaintiff drew my attention to this case) where it is stated:

> With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was

a that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded; and the conclusion is, that it is only for the purpose of taking the account that any defence ought to be admitted in this case.

Now in the present case, the defendant in para. 5 of his affidavit in reply (encl. 7) merely asserted that "The plaintiff knew that the chargor was merely a trustee for me when it accepted the charges". Based on this bare allegation his Counsel submitted as stated earlier, b that the "plaintiff's charges were procured by fraud to which the plaintiff was a party to it". On principle and authorities, I cannot accept such a contention. The aforesaid assertion of the defendant is merely a bare general allegation and he has not given any particulars, matters and circumstances to show when and in what way was the plaintiff involved in the purported fraudulent practice. Since he accused the plaintiff with fraudulent intention or practice he should know the facts, matters and circumstances relating to the plaintiff's fraudulent practice. c Yet he gave no details of such fraudulent practice. For these reasons the defendant's allegation of fraud must in law be totally disregarded.

The next thing which I must consider is whether the vesting order of the Court granted to the defendant has any effect on the three charges on the said land. At the outset I agree that the order of the Court vesting the said land on the defendant does not tantamount to d a 'transfer' of the said land by the borrower to the defendant and hence ss. 215(3) and 216 of the National Land Code 1965 cannot apply. However that may be since the vesting order is silent as to the fate of the three charges on the said land, the said charges must still remain. Furthermore the three charges on the said land were duly registered over 10 years prior to the defendant obtaining the vesting order and the defendant has not at all material times raised any objection as to the validity of the said charges until the institution of this e action. Under these circumstances I am inclined, to hold and I do so hold that the said charges are indefeasible by virtue of s. 340(1) read with the proviso to subsection (3) of that section of the National Land Code 1965. That being the case, I agree with the Counsel for the plaintiff that notwithstanding the non-applicability of ss. 215 and 216 of the said Code, the defendant steps into the shoes of the plaintiff and he has to take the said land subject to the three charges.

f Another point worthy of notice is that the defendant did not say in his affidavit as to who was the registered proprietor of the said land at the time when the charges were registered. On the contrary the charge instruments Form 16A shows clearly that the registered proprietor at the material time was Lim Guan Cheng (see Exhibits PKP1, PKP2 and PKP3 annexed to the affidavit of Phong encl. 2). The defendant in his affidavit-in-reply (encl. 7) has failed to enlighten this Court as to when and how was the said land held in trust for the defendant. g Even if the said land was held in trust the defendant should have lodged a caveat against the said land to protect his interest. This he failed to do until some years after the three charges were registered by the plaintiff. This omission on the part of the defendant substantiates the plaintiff's assertion that it was totally unaware that the borrower was purported to hold the said land as trustee of the defendant.

h Finally when the exceptions in s. 340(2) of the National Land Code do not apply as they did not apply to the instant case, the registered charges must defeat a prior equitable right or interest (if any) of the defendant. (See *Bank Bumiputra Malaysia Bhd. v. Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte. Md Jamin, Intervener)* [1989] 1 MLJ 381). Furthermore the plaintiff stands on firmer ground when the defendant had not at all material times lodged a caveat against the said land (see *Macom Express Sdn. Bhd. v. Goh Hooi Yin* i [1976] 2 MLJ 53).

In any event the maxim of he who is earlier in time is stronger in law must apply in favour of the plaintiff (*Abigail v. Lapin* [1934] AC 491).

For the above reasons I reject the objections of the defendant and allow the application of the plaintiff made by way of this originating summons. I grant an order in terms of the reliefs asked for by the plaintiff. The defendant is to pay the costs of the proceeding to the plaintiff.

Also found at [1992] 2 CLJ 842